liability as between himself and his co-partners in respect of transactions subsequent to the transfer and notice thereof given to them. But even in this case the transfer alone does not render the transferee a member of the partnership, and liable as between himself and the other members to any of the debts of the firm. In order to render him a partner with the other members, they must acknowledge him to be a partner, or permit him to act as such.

The deceased had passed away on 30 August 1988 but it is clear from the affidavits of the fourth defendant (encl 15) and the advocate and solicitor (encl 21) before whom the prescribed forms were signed, that the deceased and the third and ninth defendants had actually withdrawn as partners of the first defendant on 15 August 1988.

On these facts, I was of the view that the preliminary objections of learned counsel for the defendants should stand and hold that the plaintiff had no locus standi. Accordingly, I set aside and vacated the court order dated 24 June 1989, vacated and lifted all execution, attachment and any other processes, directed that damages suffered by the defendants by virtue of the 24 June 1989 order be assessed by the senior assistant registrar, and that each party bear their own costs.

Application allowed.

Solicitors: *Bachan & Kartar; Chai Chew & Partners.*

Reported by *PS Ranjan*

Malayan United Finance Bhd, Johore Bahru v Liew Yet Lan

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 31-745 OF 1985
VC GEORGE J
4 JUNE 1989

Civil Procedure — Application in chambers — Whether should be heard ex parte or inter partes — Circumstances in which application may be heard ex parte — Extension of time — Whether may be granted on ex parte application — Delay — Discretion of court — Rules of the High Court 1980, O 25 r 7, O 29, O 32 r 1, O 49 r 2 & O 52 r 2(2)

Contract — Foreclosure proceedings — Order for sale of land — Conditions of sale — Chargee — Whether in position of vendor — Variation of terms of order or of conditions — Time the essence of the contract — Application for extension of time — Consent of vendor not obtained — Deposit paid by purchaser — Breach of condition by purchaser — Forfeiture of deposit

Land Law — Foreclosure proceedings — Order for sale of land — Conditions of sale — Chargee — Whether in position of vendor — Variation of terms of order or of conditions — Time the essence of the contract — Application for extension of time — Consent of vendor not obtained — Deposit paid by the purchaser — Breach of condition by purchaser — Forfeiture of deposit — National Land Code 1965, ss 253, 256, 257, 258 & 259

Words and Phrases — 'Forfeit'

The plaintiffs, as chargees of a piece of land, took out foreclosure proceedings in which eventually the senior assistant registrar of the court by an order gave directions for the sale of the land. The order prescribed the conditions of sale. Condition 5 provided that the highest bidder shall be the successful purchaser. Condition 6 provided that the purchaser shall pay a deposit of 25% of the amount of the purchase price to the senior assistant registrar immediately after successfully bidding for the land. Condition 7 provided, inter alia, that the balance of the purchase price shall be paid within 30 days of the date of sale and that in that respect, time shall be of the essence of the contract. Condition 19 provided, inter alia, that if the purchaser shall fail to comply with the conditions of sale, the deposit shall be forfeited to the vendor. Condition 20 provided that the decision of the senior assistant registrar shall be final in all matters not provided for under the conditions.

The successful bid at the auction held on 20 September 1987 was made at the purchase price of $145,000 and the purchaser paid forthwith, in accordance with condition 6, the sum of $36,250 being 25% of the purchase price. The purchaser failed to pay the balance of the purchase price within 30 days of the date of sale. The balance sum was paid only on 29 September the following year.

On 11 June 1988, the plaintiffs filed a summons-in-chambers seeking an order that they were entitled to the sum of $36,250 as money forfeited to the vendor and for that amount less costs and expenses of the auction to be paid to them, such amount to diminish the amount that the charges secured. The summons was fixed for hearing on 24 August 1988. On 28 July 1988, the purchaser made an urgent application by summons-in-chambers seeking an extension of two months from 28 July 1988 to complete the purchase of the land. The application was heard ex parte on 30 July 1988 by the senior assistant registrar who purported to grant the extension. On 29 September 1988, just before the expiry of the extension, the purchaser paid the balance sum.

The plaintiffs made an application to set aside the ex parte order for extension. That application and the plaintiffs' application for release of the deposit were heard and dismissed with costs by the senior assistant registrar. The plaintiffs appealed against the orders.

Held, allowing the plaintiffs' appeal:

(1) In a forced sale pursuant to s 256 of the National Land Code 1965, the chargee at whose instance the sale is effected is to be regarded as the vendor. The defaulting chargor abdicates his right as registered owner of the land, vis-a-vis selling it, in favour of the chargee. The order for sale and the said conditions of sale were to be regarded as the sale and purchase agreement. No variations of the terms of the order or of the conditions of sale may be effected without the consent of the parties. However, where either the order or the conditions of sale or the Code specifically reserves any right to vary, then and only then may such a right be exercised.

(2) Condition 20 of the conditions of sale which provided that the decision of the senior assistant registrar shall be final in all matters not provided for under those conditions had no application to the case. The forfeiture provision on default was mandatory in nature.

(3) In the face of condition 7, particularly with the expressly emphasized provision thereto that time shall be of the essence of the contract and in the face of condition 19, the learned senior assistant registrar had no jurisdiction to entertain the ap-

plication to extend the time for completion without the consent of the chargee.

(4) In any event, the application should not have been heard and disposed of ex parte and even if the senior assistant registrar had the discretion to allow the application in the face of the fact that the application was made some nine months after the 30 days to complete the sale had expired, she should in any event have dismissed the application.

(5) There was no need for any application or order to have the forfeiture effected. Particularly as time had expressly been made of the essence in respect of the condition to complete, as soon as the 30 days expired the money was forfeited, the purchaser lost the right to it or was deprived of it.

(6) The policy and effect of the relevant provisions of the Rules of the High Court 1980 was that all applications in chambers have to be made by summons inter partes other than applications specifically excluded by the rules from being so brought. Accordingly, there not being any provision anywhere which allowed applications for extension of time to be made by an ex parte summons, having the purchaser's application heard as an ex parte application was hearing the application by procedure independent of the Rules of the High Court 1980 and as such the order made was a nullity.

Cases referred to

1 *Lim Beng* v *AVA Palaniappa Chetty* [1922] 1 FMSLR 264 (folld)
2 *Anlaby & Ors* v *Pretorius* (1888) 20 QBD 764 (folld)
3 *Syarikat Joo Seng & Anor* v *Habib Bank Bhd* [1986] 2 MLJ 129 (refd)

Legislation referred to

National Land Code 1965 ss 253, 256, 257, 258, 259
Rules of the High Court 1980 O 25 r 7, O 29, O 32 r 1, O 49 r 2, O 52 r 2(2)

GS Khoo (*Miss*) for the plaintiffs.
TK Lim for the purchaser.

Cur Adv Vult

VC George J: The plaintiffs as chargees of the land known as lot no 9525 in the township of Johore Bahru held under grant no 23537 took out foreclosure proceedings and on 10 March 1986, the court granted a consent order giving the defendant chargor until 10 April 1986 to make certain payments failing which the said consent order provided that the plaintiffs as chargees were at liberty to proceed to have the said land sold for the recovery of some $213,384.66, being the amount outstanding secured by the charge due and payable as on 10 March 1986 by the defendant to the plaintiffs. The defendant failed to make the payment and on 15 June 1986 directions for the sale of the land were given by the learned senior assistant registrar by her order of 15 June 1986 which, inter alia, prescribed the conditions of sale. Condition 5 provided that the highest bidder at the auction shall be the successful purchaser. Condition 6 provided that the purchaser shall immediately after successfully bidding for the land pay a deposit of 25% of the amount of the purchase price to the senior assistant registrar. Condition 7 was as follows:

> The purchase shall be completed at the Registry, High Court, Johore Bahru and the balance of the purchase money shall be paid into court to the credit of the above-mentioned proceedings within thirty (30) days from the date of the sale; if the 30th day shall fall on a holiday, then on the first day after the 30th day, and this respect *time shall be the essence of this contract*. (Emphasis added.)

Apparently the conditions of sale were published with the emphasis as shown in the above reproduction of condition 7.

The successful bidder at the auction on 20 September 1987 was Boo Choon Sia who is referred to as 'the purchaser' in this summons. The purchase price was $145,000 and in keeping with condition 6 of the conditions of sale, the purchaser forthwith paid to the senior assistant registrar $36,250 being 25% of the purchase price. The balance was to be paid, as per condition 7, within 30 days of 20 September 1987. The purchaser however failed to comply with condition 7 of the conditions of sale in that he failed to pay the balance of the purchase price or any portion thereof within the said period prescribed by condition 7. The amount due was tendered to the court only on 29 September of the following year.

The court file shows that by a letter dated 2 February 1988 to the purchaser, the senior assistant registrar reminded the purchaser that he had not paid the balance of the purchase price. By his reply dated 7 February 1988, the purchaser said he was hoping to obtain a loan to pay off the balance and he further expressed the hope that he would be given an extension of time.

On 11 June 1988, the plaintiff filed a summons-in-chambers seeking an order that they were entitled to the deposit of $36,250 as money forfeited to the vendor, and for that amount less costs and expenses of the auction to be paid over to them, such amount to diminish the amount that the charge secured. The summons-in-chambers was fixed for hearing on 24 August 1988. I pause to note that this summons-in-chambers was entered in the court file as encl 66.

Well over a month after the encl 66 was filed, the purchaser, on 28 July 1988, filed a summons-in-chambers seeking an extension of two months from 28 July 1988 to complete the purchase of the land auctioned on 20 September 1987. Apparently, because there was a certificate of urgency, this summons was fixed for hearing on 30 July 1988. It was sought to be and was fixed to be heard on an ex parte basis. Curiously, although the purchaser's summons was filed well over a month after the plaintiffs' said summons encl 66, it was entered into the court file as encl 61.

On 30 July 1988, the summons encl 61 was heard ex parte and the learned senior assistant registrar purported

to grant the applicant purchaser an extension of two months from 30 July 1988 to complete the purchase. On 29 September 1988, which was just before the expiry of the two months extension, the purchaser paid in the balance of the purchase price and thereby purported to complete the purchase.

The plaintiffs, who were waiting for their application for the release of the deposit to be heard on 25 September 1988, only came to know of the extension of time that the purchaser had obtained when they were served with a copy of the order giving the extension on or about 8 September 1988. When their own application encl 66 came on for hearing, they had it adjourned to 28 November 1988 pending the hearing of a fresh application they intended to make to have the ex parte order of 30 July 1988 set aside. The application to set aside and supporting affidavit were sent to the court on 1 October 1988 and were received on 3 October 1988 on which day the senior assistant registrar issued the summons (encl 77) fixed to be heard on 3 December 1988. Eventually both applications (the application to set aside (encl 72) and the application for release of the deposit (encl 66)) were heard on 28 January 1989 when they were both dismissed with costs.

The plaintiff lodged a caveat against any transfer of the land and appealed against both decisions, the notices of appeal being encls 73 and 74 respectively which appeals came before me and were each allowed with costs. I now give the grounds of my decision.

The order for sale of the land in question was made pursuant to s 256 of the National Land Code 1965. It was made inter partes and the order made had, pursuant to s 257, to contain and did contain certain directions and the conditions with respect to the sale. By s 258(2), the chargee had to prepare the conditions of sale 'in accordance with the terms of the order (of sale) and any determination thereunder by the registrar of the court'. A copy of the order had to be served on the chargor and every chargee of the land.

In a forced sale pursuant to s 256 of the National Land Code 1965, the chargee at whose instance the sale is effected is to be regarded as the vendor. Section 253(1), in stating 'that the provisions of this chapter in the National Land Code (dealing with 'Remedies of Chargees — Sale') shall have effect for the purpose of enabling *any chargee to obtain the sale of the land* ... to which his charge relates ...' and in particular the words therein that I have emphasized I think makes that clear. In *Lim Beng* v *AVA Palaniappa Chetty*,[1] Sir Thomas Braddell CJC said, with reference to a chargee who was the defendant in the suit:

> I think Mr Rogers is right in his submission that the defendant must be regarded as the vendor.

and went on to make certain orders on that basis. I think I should and I do lay down that the defaulting chargor abdicates his right as registered owner of the land vis-a-vis selling it, in favour of the chargee.

The sale takes place in terms of the order for sale made and the conditions of sale imposed 'in accordance with the order and any determination thereunder by the registrar of the court'. In as much as the chargee at whose instance the sale is effected is to be regarded as the vendor, the order for sale and the said conditions of sale are to be regarded as the sale and purchase agreement. In my judgment, no variations of the terms of the order or of the conditions of sale may be effected without the consent of the parties. However, where either the order or the conditions of sale or the National Land Code 1965 specifically reserves any right to vary, then and only then may such a right be exercised. It seems to me that the only such reservations available in the instant case are that provided by s 259(2)(e) which allows the registrar in the event of the sale being aborted to fix a subsequent date for the sale either at the same or at a reduced reserve price and that provided by condition 20 of the conditions of sale which is to the effect that the decision of the senior assistant registrar shall be final *in all matters not provided for* under those conditions (emphasis provided) and condition 4 which provides for the senior assistant registrar the right to refuse any bid.

Among the matters provided for under the conditions of sale and therefore do not come under the ambit of condition 20 are that the successful purchaser is required to pay a deposit of 25% of the bid at which the hammer fell forthwith (condition 6), and the balance within 30 days from the date of the auction (condition 7) which condition had appended to it as has been noted, duly emphasized, that '*time shall be the essence of the contract*'.

Then comes condition 19:

> If the purchaser shall fail to comply to these conditions of the general conditions of sale known as 'The Johore conditions of sale':
>
> — his/her deposit shall be forfeited to the vendor and the property shall be resold and deficiency in price, if any, arising out of the resale or attempted resale shall be made good and recoverable from the defaulting purchaser.

It is to be noted that the forfeiture provision on default is mandatory — 'his/her deposit shall be forfeited to the vendor ...'.

In my judgment in the face of condition 7, particularly with the expressly emphasized provision thereto that time shall be the essence of the contract, and in the face of condition 19, the learned senior assistant registrar had no jurisdiction to entertain the application to extend the time for completion without the consent of the chargee.

In any event the application should not have been heard and disposed of ex parte and even if the registrar had the discretion to allow the application in the face of the fact

that the application was made some nine months after the 30 days to complete the sale had expired, she should in any event have dismissed the application.

In my judgment there is no need for any application or order to have the forfeiture effected. The dictionary meaning of 'forfeit' in the context is to lose the right to or to be deprived of. Particularly as time had expressly been made of the essence in respect of the condition to complete, as soon as the 30 days expired the money was forfeited — the purchaser lost the right to it or was deprived of it.

In the circumstances, the application to extend time to pay the balance made after the 30 days had expired was in any event misconceived in that the deposit had already been forfeited. In all the circumstances, the appeal against the refusal to set aside the order for extension had to be and was allowed with costs.

Now, the application encl 61 which was an application in chambers was made ex parte and was disposed of ex parte. It is contended that this was improper. It is relevant to examine the Rules of the High Court 1980 generally and some of the rules in particular. Order 32 r 1 provides that except as provided by O 25 r 7, every application in chambers must be by summons in Form 62 which form it is to be noted has reference to all parties concerned, viz:

> that all parties concerned attend before the judge (or registrar) ...

The prescribed endorsements in the form after the signature of the issuing registrar are as follows:

> This summons is taken out by the plaintiff (or as may be) of (state address)
>
> To the defendant (or as may be).

The said O 25 r 7 provides only one exception which is an application for directions in certain cases which can be made not by summons but by notice.

Order 29 deals with applications for interlocutory injunctions and r 1(2) provides that where the applicant for the interlocutory injunction is the plaintiff and there is urgency 'such application may be made ex parte by summons supported by affidavit but, except as aforesaid, such applications must be made by summons'.

Order 49 r 2 specifically provides that an application for a garnishee order nisi must be made ex parte by summons. Similarly, it is specifically prescribed by O 52 r 2(2) that an application for leave to apply for an order for committal must be made ex parte to the court.

What is to be gleaned from this is that the policy and effect of the above rules is that the general rule is that all applications in chambers have to be made by summons inter partes other than applications specifically excluded by the rules from being so brought. Accordingly, there not being any provision anywhere which allows applications for extension of time to be made by an ex parte summons, it is my view that having encl 61 heard as an ex parte application was hearing the application by procedure independent of the Rules of High Court 1980 and as such the order made is a nullity — see *Anlaby & Ors* v *Pretorius*[2] at pp 769-771 and *Syarikat Joo Seng & Anor* v *Habib Bank Bhd*[3] at p 131.

Now since the deposit was forfeited when the balance was not paid as per the conditions of sale, the amount forfeited less the costs and expenses of the auction should have been paid over to the chargees to account for the amount that the charge secured. Accordingly the appeal against the refusal to pay out the deposited amounts was also allowed with costs.

Appeal allowed.

Solicitors: *TS Chong & Co; Ong Ban Chai & Co; TK Lim & Co.*

Reported by *PS Ranjan*